2848

United States
Circuit Court of Appeals
For the Ninth District

MAX WOLF,
Plaintiff in Error,

vs.

J. M. EDMUNSON and M. J. EDMUNSON,
Defendants in Error

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

MANNING, SLATER & LEONARD,
Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

MAX WOLF,
Plaintiff in Error,

vs.

J. M. EDMUNSON and M. J. EDMUNSON,
Defendants in Error

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF CASE.

On May 29th, 1912, the defendants in error entered into a written contract with the firm of Klaber, Wolf & Netter, whereby they agree to sell and deliver to said firm at Goshen in Lane County, Oregon, on and between October 1st and October 31st, 1912, 30,000 pounds net weight of hops to be raised during the year 1913 by said J. M. Edmunson on the farm of his mother, the said M. J. Edmunson. The said firm therein agreed to purchase said hops and to pay therefor twenty-five cents per pound at the time of delivery. The said contract particularly

specified the kind of hops that were to be produced and tendered to said firm, in this language: "The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year's planting." The said purchasers were required to make advances to the seller for the cultivation and harvesting of the crop, and they did advance for those purposes the total sum of $3,000.00. By the terms of the contract the purchaser had the first right of inspection and selection from the entire crop raised on the premises. During the year 1912 Edmunson raised on the farm 215 bales of hops and tendered them to the purchasers at Goshen. The purchasers by their agents pretended to inspect said hops on or about October 3rd, 1912, but examined only two bales and thereupon advised Edmunson that the hops were not of the quality described in the contract and that if he had no better hops than those examined the purchasers would not take them. At that time the market price of hops had declined to 16 to 20 cents per pound according to the opinion of different witnesses. On the evening of the 3rd of October or the morning of the 4th, the purchasers' agent returned to Goshen to make further inspection, but none was made at that time, it being mutually understood that

a full inspection might be made later and within a reasonable time. The purchasers' agent did not return for further inspection until the 31st day of October which was after the time provided in the contract for inspection and acceptance, the contract reading "between October 1st, 1912, and October 31st, 1912. (Bottom page 18, Transcript of Record.) At the last inspection the purchasers rejected the hops and demanded repayment of the advances made. The action is by Max Wolf, the surviving member of the partnership firm to recover the amount of the advances, alleging in effect, that the said firm on October 30th, 1912, inspected the hops tendered by Edmunson and found them slack dried, bad and uneven color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected with vermin damage, and for those reasons they rejected the hops and refused to take them under the contract. The defendants in error, by their answer denied the averments of the complaint as to the quality of the hops and alleged affirmatively, in substance, that J. M. Edmunson raised on the described premises in the year 1912 over 40,000 pounds of hops of the quality described in the contract and tendered them in time to said firm, but that because the market price of hops had fallen from the contract price of 25 cents per pound to about 16 cents per pound at the time of the inspection, they, the purchasers, did not act in good faith in inspecting the hops, but inspected only two

bales of hops about October 3rd, 1912, and rejected the entire lot, and that on October 31st and after the time for inspection had passed they again pretended to inspect, but acted arbitrarily and without cause rejected the hops. The defendants also counter claimed in damages, alleging that by reason of the wrongful rejection and delay they had caused them damages in the amount of $3,900.00. Upon the trial of these issues the jury found for the defendants in error to the amount of $400.00 and judgment was accordingly entered. The plaintiff has prosecuted this appeal from the judgment.

POINTS AND AUTHORITIES.

I.

If there is a specific agreement as to quality no additional condition will be implied or read into the contract by construction.

35 Cyc. 216.

Gieg vs. Wooliscroft, 52 Ill. App. 214.

Trotter vs. Hecksher, 42 N. J. Eq. 251.

II.

A designation of the article as "good" or "sound" means that it shall be of medium quality, according to the custom of the trade, and suitable for the purpose for which it is intended. But "good" does not imply any absolute quality but only that the article shall be good of its kind.

35 Cyc. 218.

III.

The defendants were not bound to a strict or literal compliance, but only to a substantial compliance of the contract.

3 Elliott on Contracts, Sec. 1878.

35 Cyc. 216.

IV.

Testimony as to quality of an article by observation, and the testimony of a chemist as to quality are of the same legal grade of evidence, and the exclusion of either would be illegal.

Jones on Evidence, 2nd Ed., Sec. 361, p. 453.

V.

The granting or refusing to grant a motion for a new trial rests wholly in the discretion of the court where it is made and the action of such court cannot be reviewed on error.

Wheeler vs. U. S., 159 U. S. 523.

Blitz vs. U. S., 153 U. S. 308.

Moore vs U. S., 150 U. S. 57.

New York etc. R. Co. vs. Winter, 143 U. S. 60-75.

4 Corpus Juris 831, Note (e).

ARGUMENT.

I.

It was competent and material for the witness Ross H. Woods to answer the question propounded

to him on his cross-examination as set forth in the first assignment of error. This witness was called by plaintiff to testify as an expert. He had assisted in inspecting the hops in question for the purchasers when they were re-sold in March, 1913, by the defendants in error. On direct examination he had testified in substance that he had graded the hops into three grades, putting 80 bales in the first grade, but in shipping them he put them into two grades, the first containing 103 bales; that they had certain defects; that they were a mixed lot; some were over ripe and some were green, mixed in the samples; some showed more mould than others, the mouldier ones would be the riper ones. (Page 113, Record.) On cross-examination, he testified that he did not exactly grade the hops as he had indicated in his direct examination, but only to get a better hundred, and he put 103 bales of that class in one car, and these he said "were a little evener in color and not so much mould in them." (Page 115, Record.) Then counsel for defendants proceeded to cross examine this witness at some length as to his expert knowledge of the different grades of hops and the general manner used by hop inspectors in testing the quality and grading of hops. After this witness had testified (page 123, Record), that some of the hops in question were over ripe and some of them green, he was asked this question: "Well, don't you know, as a matter of fact, that in picking a reasonably large yard, that the last of the picking usually

is a little riper than the first?" to which he answered "Yes." Then he was asked, "They cannot all be of the same color, can they?" and he answered, "Well, they can be practically so, yes; but not exactly the same. The first days of picking and the last days of picking will be a difference in color, that is very true." Following which the question, on which error is based, was asked, "What you men mean to get at is the general average of the crop." This question, as the court will be able to see from the context, was not asking the witness for his general average of the hops in question, but generally speaking, as to the manner of judging a crop. The answer of the witness, contains a statement not responsive to the question, but there was no motion to strike. The witness said, "Well, yes. There was some of them green in each sample and some of them ripe—mixed—as you were talking a while ago about when those were dumped off the kiln floor." It is ordinarily within the discretion of the presiding judge to determine to what extent the witness shall be cross examined on facts otherwise immaterial, for the purpose of showing bias or want of credibility. Commonwealth vs. Lyden, 113 Mass. 452.

II.

The second error assigned is no more forceful than the first. The plaintiff's case was made up from the evidence of so-called hop experts. The witness, Edmunson, himself had done work in that

line, and also had an extended experience as a hop grower. The accuracy of the methods employed by hop inspectors in judging the quality of hops was a fair question for investigation. It consumed a good part of the examination of those witnesses. The question and answer objected to do not necessarily question the veracity or good faith of plaintiff's witnesses. It goes to the accuracy of the result in judging of the quality by the method disclosed. In his reasoning on this point counsel wrongly assumes as a fact that his experts did not differ in their judgments on the quality of the hops in controversy. A perusal of the testimony recited in this bill of exceptions will disclose quite a variation in judgment as well as in reasons therefor. Hinkle when grading these hops, put 104 bales in No. 1, 80 in No. 2, 29 as slack dried and two as perished, and classed all of them as medium; but on cross examination he admitted that in a pinch the 104 bales marked by him as No. 1, would go as prime, the next grade above mediums (page 50, Record); while witness Woods found only 80 bales of the better quality, but on cross examination he admitted putting 103 bales in the best grade. Hinkle admitted on cross examination that experts in judging hops do sometimes disagree (page 54, Record). Harry L. Hart graded them as a lot from poor medium to an extreme high grade medium (page 68, Record). He based his judgment on the unevenness and rather dullish color and a little mould (page 70, Record), while Woods

and Hinkle found considerable mould in all of them. Pond vs. Pond, 132 Mass. 224, cited by counsel in no way supports his contention.

III.

The third assignment of error goes to the alleged incompetency of the question propounded to John Edmunson as to whether he had 30,000 pounds of hops there of the quality described in that contract. The objection is that the question calls for the conclusion of the witness. He was testifying as an expert hop man. He was qualified to state an opinion, but it is argued by counsel and his authorities cited seem to support that view, that before he may give an opinion he must state all of the relevant facts. We are not disposed to controvert this statement of the law. If, prior to the asking of the question he had not stated the facts on which he based his evidence, the question may have been objectionable, but we do not assent to the premises. This witness testified in chief at considerable length, beginning at page 129 of the printed record, about all of the material circumstances and surrounding facts that might affect the quality of the hop during its growth, harvesting, curing and baling, and denying the existence of all deleterious conditions, such as the existence of lice, lack of spraying, falling of the hops in the yard before being picked, overloading of kilns, picking too soon, picking too late, etc., supposed by plaintiff's witnesses to have existed in jus-

tifying their opinion as to the asserted poor quality of the hops.

He then, at page 145 of the Record, expressed the opinion that he had over 20,000 pounds of choice hops in the lot, and that the rest of the hops would grade prime, with the exception of what they call the ripe end, which amounted to 7 or 8 bales. Then witness explained the condition of the two bales testified to by plaintiff's witnesses as perishing, and the cause of that condition, following this on page 147 of the Record, witness gave the material qualities necessary in his opinion to make a choice hop, a prime hop, and a medium hop. At page 150 of the record witness stated that there was about 20,000 pounds of the hops that did not have any mould in them. The rest of them had a little mould in them. Then the question to which objection is made was propounded. We contend that as a matter of law, this record meets the conditions stated in counsel's authorities, so as to entitle the witness to express the opinion given. But if we should be in error about this, counsel on cross examination of the witness proceeded to supply any deficiency that may have theretofore existed. This cross examination begins at page 150 of the printed record. It goes through the whole gamut of the existence of mould, the color, maturity, over ripe hops, properly dried and cured and vermin damage. So that if there were error at the time in permitting witness to

answer the question objected to, it was thereafter cured by counsel for plaintiff in error.

Counsel opens his argument upon this assignment of error, with the statement that "the defendants, under their counter claim to prevail thereon were required to prove that the defendants had 30,000 pounds of hops of the quality prescribed in the contract." This is not correct; the plaintiff in error sued to recover advances made, alleging that defendants had breached the contract by failure to deliver hops of the kind and of the quantity agreed to be delivered. The burden was upon plaintiff to prove the issued made. If he failed in his proof, the necessary result of the proof is that defendants were entitled to recover on their counter-claim such damages as they may have suffered.

Whether the plaintiff made such a case was for the jury and they passed on that question against plaintiff's contention. The question propounded was not asking the witness for his opinion as to whether the hops were of the quality described in the contract, but as to the quantity of hops of that quality. Counsel say, "The question and answer were evidently based on the assumption that hops graded prime in the opinion of the witness were of the quality prescribed by the contract." There was no such assumption. Counsel is here applying his erroneous theory as a test of this witness's testimony. The theory of counsel in the trial of this case is that nothing but hops of choice quality as defined

by his experts will comply with the contract. We have contended and do now contend that counsel is attempting to import into the terms of the contract a test of quality not found there, as we will hereinafter show. Counsel then say in concluding their argument on this point, that "The witness had already testified to the quality of the hops and their various grades as he judged them." If so, then, the witness had a right to give his opinion as to the quantity of such hops and it was for the jury to say whether that opinion was justified.

IV.

The fourth assignment of error is based on a general objection interposed by counsel for plaintiff in error to the testimony of Bert Pilkington, an expert chemist, as to the amount of lupulin or hard and soft resins contained in the hops in question. The contention made by counsel in stating this alleged error, is that this manner of proving quality is "An attempt to impose in this case a standard different than that of hop men." The witnesses testifying for plaintiff in this case as experts in judging of the quality of hops, uniformly agreed that the lupulin in the hops was the prime element thereof for beer making purposes, and the amount of the lupulin contained in the hops was the measure of its maturity as a hop and indicated the commercial value thereof. The defendants' witnesses testified that the lupulin in the hops was the hard

and soft resins therein, and this was not controverted by plaintiff in error. The expert witnesses for plaintiff judged the amount of the lupulin in the hop, its soundness, maturity and value by observation. (Testimony, H. A. Hinkle, pages 52-53 of Record; Hal V. Bolam, page 63; James Hayes, page 106, and Ross H. Wood, page 125.) The defendants in error, by the testimony of witness Bert Pilkington, endeavored to establish the quality of the hop as to its maturity, that is the amount of lupulin in it, by the result of a chemical analysis. The contention of counsel that the attempt to prove quality by a chemical analysis imposes a standard different from that of the hop man is, as a fact, quite true, but the query is, is that a sufficient legal objection to the admissibility of the evidence. It is to us the assertion of a new and unheard of proposition of law that because one party to a contract for the sale of personal property has been accustomed to judge of the quality of the article sold, in a particular way, binds the other party to the use of the same method. Custom and usage of a community, when properly alleged and proven may become a part of contract, but the manner of proving, in a court of law, a question in dispute arising out of contract, is not limited by the terms of the contract either expressed or implied therein by force of custom and usage. A custom of determining quality by observation indulged in by one of the parties to a contract for any length of time can not import into

that contract a binding obligation upon the other party thereto to confine his evidence of quality to observation if in fact there is any other method at hand recognized by courts of law as a legal and proper method of making proof. Mr. Jones in his work on evidence, 2nd Ed., at Section 361, page 453, says, "The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence, and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal." Citing Peoples vs. Deacon, 109 N. Y. 374, and Com. vs. Sturdivant, 117 Mass. 122, 19 Am. Re. 401.

Counsel in support of their contention cite Netter vs. Edmunson, 71 Ore. 612. That case is the same case as the one now before the Court. After securing a reversal of the judgment obtained in the lower court by the defendants therein, the plaintiff dismissed the case and brought this action in the Federal Court. The opinion of the State Court in that case seems to concede that the opinion of the chemist would have been competent if confined to proof of the soundness of the hops and not extended to the general quality of the hops. In the trial of this case we endeavored to avoid the criticism of that opinion by confining the testimony offered by Pilkington to proof of the soundness and maturity of the hop. The principle stated by the Court, namely, "The contract under consideration defined

the hops to be produced in terms which must be taken as the yard stick by which to measure their quality," is correct and the cardinal principle governing the contract and its interpretation. The Court in that opinion seems to admit that if the testimony of the chemist had been limited to the question of the "soundness" of the hop, that is the presence or absence of resin, it would have been material and competent. At the top of page 612 of the opinion, the Court says, "It is argued that the presence or absence of resin in large quantities affects the soundness of the hops, which was one of the components of the hops agreed to be delivered, and for that reason the testimony of the chemist was competent to go to the jury. We admit the logic that one is corollary to the other; still the objection remains that the testimony of the witness was not limited to an exposition of that element, but was given to the consideration of the jury upon the question of the quality of the hops." The word "quality" as there used by the Court evidently was intended to mean whether they were "choice," "prime" or "medium." That case was tried by the plaintiff, as he also tried this one, upon the erroneous theory that the contract in question described what is known in the hop trade as a "choice" hop, and all of the opinion evidence offered by the plaintiff as to the quality of the hops was measured by the definition given by Hal V. Bolam of a choice hop. This will be found on page 607 of the printed

opinion. The first question there propounded to that witness was, "Can you tell the jury what constitutes a choice or first quality hop?" The answer was "Yes"; then by request of counsel the witness proceeded to do so, in part, as follows: "In my judgment what would constitute a choice hop is a hop bright in color, whether green or yellow is immaterial, but the hop should have a brightness and shine; it should be soft in texture as you feel it in your fingers—it should not be of a harsh feeling; it should be rich in lupulin. Lupulin is the pollen contained in the center of the fully matured hop and is its chief ingredient. Another characteristic of the hop, which a great many overlook, is flavor. Choice, prime and medium, in my opinion, depends wholly upon the flavor of the hop. But the two things generally follow one another. In other words, in my humble judgment, the real expert of a hop can tell by the look practically what its other constituents are. It will have that rich, velvety look, which I would roughly explain is the choice hop." At the conclusion of that statement of evidence on page 608 of the opinion, that witness graded the hops in question as *"medium."* Now at the conclusion of the statement of the evidence of the chemist, Bert Pilkington, at the bottom of page 610 of the opinion, that witness was asked, "What do you say about the hops you examined for Edmunson as to their grading?" and the witness answered, "They are above the average we have examined." This in

effect was an attempt to grade the hops as to quality generally, by the chemical analysis made by the witness. It is to that feature of the testimony, that the Court in that opinion, objected. But in the trial of this case we limited the testimony of that witness to proof of the soundness or amount of resin in the hop, only, and therefore we did not ask of this witness his opinion as to the grade of the hops, based on his chemical analysis. But the fundamental error in the trial of that case, as we have suggested, was committed by the plaintiff.

The character of the hops to be produced and delivered by the defendants is specifically stated in the contract as follows: "The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not over-ripe, flakey, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage, said hops shall not be of the product of a first year's planting." Now, this contract does not, in terms, mention a choice hop, prime hop or medium hop, as used in the hop trade. Hence there was no room for plaintiff to inquire, as he did, what constitutes a choice hop or a first quality hop, assuming by the question that they were the same, and then when a false standard for comparison has been set up, have the witness give his opinion as to the grade of the hops in question, in terms not fixed by the contract. If it was competent for plaintiff

thus to establish the grade of the hops, it was certainly competent and material to establish their grade by chemical analysis. The particular qualities of the hops bought and sold are expressed in the contract. It is for the Court to construe the contract. The first quality mentioned therein is that "of sound condition" and the second, "good and even color." A designation of an article to be sold as "good" or "sound" means in law, that it shall be of medium quality, according to the custom of the trade, and suitable for the purpose for which it was intended. "Good" does not imply an absolute quality, but only that the article shall be good of its kind, 35 Cyc. 218; and so the Court instructed the jury in this case, as follows: "Good color or sound condition does not mean that the color shall be the best possible color, or that sound condition means the best possible condition, but such designations mean only they shall be of merchantable quality according to the custom of the hop trade, and that the hops in those respects shall be suitable for the purpose for which they were intended." (Page 250, Record.)

Now, in the definition of a choice hop, witness Hal V. Bolam described it as, "Bright in color, whether green or yellow is immaterial, but the hop should have a brightness in shine; it should be soft in texture as you feel it in your fingers—it should not be of a harsh feeling; * * * It should have that rich, velvety look which I would roughly explain

is the choice hop." There are no such designations in the contract as to color or feeling. Again, he testified, "It should be rich in lupulin"; while the contract requires only that the hop shall be "fully matured." And further on, the same witness says in his definition: "Choice, prime or medium, in my opinion, depends wholly upon the flavor of the hop." But flavor is not specified or mentioned at all among the qualities of the hop described in the contract. So then the effort of plaintiff in this case to test the quality of the hops in question solely by the standard used by hop men in judging hops, violates not only the principles of the law of evidence, but the terms of the contract itself. The Trial Court, in admitting the testimony of the chemist, qualified and limited the inquiry to the amount of resin or pollen in the hop by this language: "There has been testimony here coming from the witnesses produced by the plaintiff touching the amount of resin or pollen, as it has been described, or the lupulin that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hops. If this witness is competent to testify concerning the quantum of the lupulin in the hops, or specimens examined, I think that would be proper to go to the jury." (Page 28, printed record.)

The fifth assignment of error is based upon the same contention as the fourth assignment of error, and the answer made by us to the former will be

sufficient as to the latter.

The sixth, seventh and eighth assignments of error practically are the same. The objection is to the witness testifying as to the result of his chemical analysis of a number of samples of hops received by him from dealers in hops in this and other states, and marked "fancy," "choice," "prime" or "medium." The witness had been asked by the Court if he knew what a choice hop is, that is, choice hop measured by the commercial rule; and the witness answered that he did not, and based on this answer the Court first excluded this proffered testimony. Later on, and after an intermission in the court proceedings, the Court reversed this ruling and permitted the witness to testify. The objection of plaintiff in error seems to be based on this contention, that the contract involved herein calls for the delivery of choice hops as defined by his witnesses, and, as the witness had testified that he was not able to pick out a choice hop as known in the commercial trade, it would not be competent for him to testify as to the amount of resin or lupulin in samples of hops furnished to him by third parties and marked as choice. When this objection had been stated to the Court, the Court ruled that unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. "If you can show," the Court said, "by this witness that he is acquainted with commercial hops, and the amount

of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point." (Pages 190-191 of printed record.) Then this witness was asked this question: "I will ask you, professor, if you made chemical analysis, at the time you examined this particular sample or prior thereto, of samples of commercial hops, to ascertain the amount of resin therein?" The answer was, "Yes, sir." The witness explained that he had received the samples analyzed by him from different hop dealers in this state, naming, among others, T. A. Livesly, Mr. Seavey, who was a witness for plaitiff in this case as an experienced hop man, and Mr. Horst, of California; following which he testiifed that the samples examined by him represented commercial hops. The purpose of this proffered testimony was not, as the Trial Court and counsel seemed to think, to establish, by comparison with other hops, that the hops in question were choice hops, or prime hops, but to show that they possessed sufficient lupulin or resin to make them a commercial hop in the market, that is were they within the terms of the contract, a fully matured hop. To make this comparison all that was necessary to be shown by the witness was that the samples with which the comparison was made were of commercial grade, and this the witness testified to as of his own knowledge. The fact that these samples came from reputable hop dealers, for the purpose of having an analysis of the lupulin or resin

made is sufficient, in our judgment, to admit this evidence. The form in which counsel for plaintiff in error has stated his eighth assignment of error, shows the fundamental error into which they have fallen in the trial of this case. Counsel moved to strike out all of the testimony by this chemist, "As assuming that a hop that contains eighteen per cent and a fraction, whatever it is, is a choice hop, or a hop that is a first quality hop under this contract." Here, counsel assume that the hops described in the contract must be a choice hop. We have already shown the error of that contention, but the objection goes only to the weight of the testimony and not to the quality of it.

However, if there were error in admitting any of this testimony it was cured by the Court when instructing the jury as follows: "I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not strictly speaking, the real inherent or *chemical* value." (Page 250, Record.)

The ninth assignment of error is based on the denial of plaintiff's motion for a new trial. The rule is laid down by a great number of decisions by

the United States Supreme Court and by the Circuit Courts of Appeal, without qualification, that no error can be assigned on the action of the Trial Court in granting or in refusing a new trial. Wheeler vs. U. S., 159 U. S. 523; Blitz vs. U. S., 153 U. S. 308; Holder vs. U. S., 150 U. S. 91; Moore vs. U. S., 150 U. S. 57; New York, etc., R. Co. vs. Winter, 143 U. S. 60-75. See also 4 Corpus Juris. 831 note (e) where many other cases may be found.

Counsel cite: McNicol vs. New York Life Ins. Co., 149 Fed. 141 as supporting the contention that error may be assigned when it appears that the Trial Court abused its discretion. That case contains no ruling whatsoever on that point. Doubtless, counsel intended to cite the case of Jones vs. Evans, 149 Fed. 136. The excerpt quoted therefrom in the brief will be found on page 141. An examination of that case discloses that the ruling was not based on the state of the evidence, but was an allowance of a new trial by the lower Court, which erroneously held that the verdict in favor of one and against another of two alleged joint tort feasors could not stand, but that the verdict must be for or against both defendants. This ruling really amounted to an erroneous ruling on a question of law and not on a question of fact. The reason for the rule that the refusal to set aside a verdict upon the grounds stated will not be reviewed is based on the theory that the mode adopted is not the proper one to secure the relief desired; that a party can not be per-

mitted to speculate upon the probabilities of a favorable verdict, and if disappointed, move to set it aside; and that having had, but, neglected, the opportunity to move for a judgment of nonsuit, or to request an instruction in his favor, in consequence of insufficiency of evidence, he can not, after verdict, be permitted to set it aside for any known reason that he could have urged during trial. Ruckman vs. Ormond, 42 Ore. 209-212. If the Court should consider it within its power to consider, at all, this assignment, certainly the presumption must be that the Trial Court properly exercised its discretion, and the burden is upon plaintiff in error to make out a *clear* case of abuse of discretion.

Counsel do not discuss in their brief the evidence in detail, but assume that the burden is upon the defendants.

The dominant fact met in this case at the outset, is that plaintiff's company had contracted to purchase 30,000 pounds of hops and to pay therefor 25 cents per pound, but, at the time delivery was to be made, hops were bringing in the open market no more than 16 to 20 cents per pound. The defendants raised, bailed and tendered to plaintiff's company at the place and time designated in the contract 215 bales which, according to the evidence, would weigh something over 40,000 pounds. The purchasers had a very strong motive to reject these hops if they could conjure up a plausible excuse. They did not deal fairly with defendants in making a

prompt examination and decision as to their attitude. On October 3rd they appeared at Goshen to inspect these hops, tested only two bales and went away, but indicated that they would reject the hops. The agent, Hinkle, on reporting to his principal was ordered back to inspect. He went back that evening, but again delayed, and did not return until the 31st of October, the day after the time for inspection had passed. Then the hops were finally rejected. Now, in inspecting these and in judging of their quality, the evidence will disclose that all of these so-called experts had fixed in their minds a false standard, one not imposed by the contract, by which to judge them. Each of these experts concluded in his own mind that defendants had contracted to furnish what is known in the hop trade as a "choice" hop. They all required a fine, bright, silky, lustrous color, but the contract specified only a "good and even color." They admitted on cross-examination that the only difference they were able to make between a "choice" hop and the next grade below, a "prime," was a slight difference in the degree of luster or brightness of each of them. And one witness, Hal V. Bolam, said that even a medium hop must have a good and even color, too, (page 66, Record). Harry L. Hart testified, "The color was not the very brightest, was not even in color; there was a certain amount of mottled color, what we call mottled or unevenness of color, and a trace of mold. They didn't grade the highest quality as a result

of the fact that they were *not perfect in color* and the other requirements which go to make a *top grade* of hop," (page 68, Record). "They were not a good color compared to a choice hop, when they might have been considered a very fair color compared with a common hop, which is still a lower grade. It is all by comparison you see," (pages 71-72, Record). Hinkle admitted that 104 bales, which would amount to a little over 20,000 pounds, might have been graded as prime, (page 51, Record). Under the extreme test imposed by all these experts, prime hops would have met the terms of this as legally construed, Hinkle admitted that he had stated to Edmunson when inspecting, that if these would come to prime he would accept them, (page 56, Record). So then, from plaintiff alone we have evidence from which the jury could have found that at least 20,000 pounds of the hops were within the contract. Edmunson testified, (page 145, Record), that he had over 20,000 pounds of hops of choice quality and that the rest of the hops would grade prime, with the exception of what they call the ripe end. That was seven or eight bales that they call over-ripe. On cross-examination he testified that the remainder of the hops had a little mold in them, but not enough to affect the quality, (page 156, Record). A little mold in a hop does not necessarily affect the quality of a hop, even a choice hop may have a little mold, (page 171, Record). And J. W. Seavey, witness for plaintiff, corroborated

Edmunson on that point, (page 232, Record). Bolam admitted on cross-examination that there was not a very great amount of mold in them, (page 63, Record), and Hart said there was a trace of mold. (page 68, Record). Heyer said there was not enough mold in the best lot to speak of, just a sprinkling of mold, (page 211, Record), and there were 20,000 to 25,000 pounds of that class.

In fact, the question is not whether the hops had any mold in them for the contract does not exclude mold, but specifies freedom from vermin damage. Bolam admitted on cross-examination that there was not a very great amount of mold in the hop, (page 63, Record).

Flavor as a necessary quality of the choice hop was exploited by plaintiff's experts, but the contract does not mention or require any particular flavor.

Maturity of the hop is a requisite, and many of plaintiff's witnesses concluded because the hops were of a greenish color, they were immature. But Bolam said, whether a hop was green or yellow was immaterial, page 64, Record). Hart said that the hops in question were greenish to greenish-yellow, but could not say that they were immature, (page 70, Record). Ross H. Wood thought that a choice hop could not be of a greenish color, (page 125, Record). Edmunson said that a choice hop could be any color so long as it has a rich flavor, and rich lupulin in it, (page 169, Record). That the hops

in question were all of one color and were fully matured, (page 156, Record).

From the foregoing excerpts from the testimony, it is certainly plain that there is ample testimony to support the verdict of the jury. The weight of the testimony was certainly for the jury and they had a right, if they saw fit, to disbelieve altogether the testimony of plaintiff's expert witnesses and accept only that of the defendant, Edmunson.

The nature of the testimony usually employed by hop men in the trial of these cases is such, that it is not considered by Courts of a very satisfactory or reliable kind. If the highest Courts discount such testimony, how can a jury be criticised for doing the same?

The case of Daniels vs. Morris, 65 Ore. 289-295, was one where the Court had to pass on the quality and weight of the evidence, and in doing so, said:

> "The contract calls for hops of prime quality, even color, cleanly picked, and not broken. Plaintiff Daniels and other witnesses called by plaintiffs, in describing or defining hops of prime quality, says it is a hop that is cured properly, picked cleanly, dried enough so as to keep, and not over-dried. They describe choice hops in practically the same terms, and, in distinguishing between prime hops and choice, they were not able to name any differential feature; but we understand from their efforts to describe them that choice hops are hops a little cleaner picked, a little better dried, with-

out being too much dried, and of a little better color than prime hops. In other words, it depends upon the opinion of the person judging, rather than on any accurately definable conditions. If hops are fairly well dried, fairly cleanly picked, and of good color, one expert can consistently pronounce them prime, while another may pronounce them less than prime; and so, also, as to choice hops. Opinions differ. If a buyer is under contract to buy prime hops and wishes to avoid his contract, it is not difficult to claim the hops as less than prime and to get his friends to agree with him. If he wants the hops, he will accept them if they are approximately prime, without objection. So there is no exact line of demarcation between medium and prime hops that can be accurately defined or drawn. The outcome of these hop contracts between the hop buyers and farmers, as to either the buyer or the farmer, is almost a pure chance. There is an absence of all the means of calculating the results. The demand and price for hops are subject to sudden and extreme fluctuation without apparent reason; and, when a person makes such a contract, he cannot expect the courts to show him leniency because of its hardships when the price is adverse to him. Both parties take the chance, and should abide by the result."

We respectfully submit that no reversible error is in the record of this case, and the judgment ought to be affirmed.

MANNING, SLATER & LEONARD,
Attorneys for Defendants in Error.